

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

October Term, 1975

No. 76-432

RENA B. WHITE
BEATRICE RICE
MYN CLEARY
GWENDOLYN LANDENBERGER
FRANCES W. KENNEDY,

Petitioners,

vs.

ARTHUR MURRAY, INC.

Respondent.

On Petition For A Writ of Certiorari To The
Supreme Court of Utah

BRIEF FOR RESPONDENT
ARTHUR MURRAY, INC. IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioners herein seek review of a decision by the Supreme Court of the State of Utah entered on May 5, 1976, on which a rehearing was denied on June 28, 1976, and which is reported at 549 P.2d 439. The decision of the Supreme Court of Utah affirmed the order of the District Court of Salt Lake County, which is unreported, granting the motion of the Respondent, Arthur Murray, Inc. (AMI) to quash the service of the summons of each plaintiff on the ground that AMI was not subject to the jurisdiction

of the State Courts of Utah under the applicable Utah Statute, which is 78-27-24, U.C.A. 1953 as amended.

The Petitioners filed complaints in the District Court of Salt Lake County, State of Utah, claiming that the defendant and Respondent, AMI, supervised, directed and controlled its franchisee in Salt Lake City, Utah, in a course of fraudulent representation and conduct. The complaints were served, together with summonses, upon Respondent AMI at its offices in Dade County, Florida. Thereafter, the Respondent filed its motions to quash on the ground that the Respondent has never done business in the State of Utah, nor did it have offices, employees or agents within the State of Utah at any time prior to, during or since the events complained of by the Petitioners, and that, therefore, the Respondent would not be subject to the jurisdiction of the Courts of Utah. The Respondent is a Delaware Corporation, with its principal place of business at Coral Gables, Florida.

As stated above, the District Court of Salt Lake County granted Respondent's motion to quash, and this decision was affirmed by the Utah Supreme Court.

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3) and 28 U.S.C. 2101(c). AMI contends, however, that this Court is without juris-

*78-27-24 U.C.A. 1953 provides in pertinent part:

Jurisdiction over nonresidents — Acts submitting person to jurisdiction. — Any person, notwithstanding Section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

- (1) The transaction of any business within this state;
- (2) Contracting to supply services or goods in this state;
- (3) The causing of any injury within this state whether tortious or by breach of warranty;

diction because the Petitioners did not raise and the courts of Utah have never passed upon the question which Petitioners seek to present here.

QUESTION PRESENTED

Did the Supreme Court of Utah deny Petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States when it affirmed the dismissal of Petitioners' State Court action against AMI and construed Utah's "Long-Arm Statute" more narrowly than Petitioners believed proper.

ARGUMENT

The District Court of Salt Lake County upon AMI's motion to dismiss determined that AMI had insufficient contacts with the State of Utah to subject it to the jurisdiction of the Utah courts under Utah's "Long-Arm Statute," which is 78-27-24 U.C.A. 1953 as amended. In affirming the decision of the trial court, the Utah Supreme Court held that the District Court properly interpreted the Statute and that the trial court's decision was amply supported by the evidence and the record below.

Petitioners now seek from this Court a trial de novo of the facts underlying the District Court's order and a decision overruling the Utah Supreme Court's interpretation of Utah's "Long-Arm Statute." The federal constitutional question, which Petitioners now seek to raise for the first time in this Court, is insubstantial at best and, in any event, Petitioners waived any such argument by failing to raise it either before the trial court or the Supreme Court of Utah.

POINT I.

PETITIONERS WAIVED THEIR CLAIM BY FAILING TO ASSERT IT IN THE COURTS BELOW.

Although Petitioners state in conclusory fashion that they argued before the Supreme Court of Utah that affirmance of the lower court's judgment dismissing the complaints were denied due process, the Utah Supreme Court's opinion clearly shows that the Court neither considered nor decided this question, and further petitioners' briefs to the Utah Supreme Court reveal that the question was never raised.*

Before the Utah Supreme Court the Petitioners argued that the Due Process Clause of the Fourteenth Amendment as interpreted by this Court allows for the broad application of Utah's "Long-Arm Statute." Petitioners further argued that the preamble to the "Long-Arm Statute"*** indicates an intent by the Utah legislature that the statute be broadly interpreted so as to confer jurisdiction over the Respondent in this case. The Utah Supreme Court said nothing about the Fourteenth Amendment in its decision, but instead relied upon prior rulings defining the scope of the "Long-Arm Statute."

If Petitioners are, in fact, urging that this Court hold that the Utah Supreme Court misinterpreted or misapplied the Utah statute in question, then they are asserting no federal claim whatsoever.

*Petitioners apparently have not obtained a certificate from the Utah Supreme Court stating that the question they seek to present here was raised and decided.

***78-27-22 U.C.A., 1953, states in part:

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

It is a well settled principle of law that the Supreme Court cannot entertain a federal question not raised in the State court below nor actually decided by the lower court. The Supreme Court itself has stated on numerous occasions that it will not pass upon a contention as to a State violation of federal constitutional rights or upon any federal question where the issue is neither raised nor considered by the State courts. See *Wilson v. Cook*, 327 U.S. 474, 90 L.Ed. 793, 66 S. Ct. 663 (1946); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 90 L.Ed. 607, 66 S. Ct. 511 (1946).

In *Nelson v. County of Los Angeles*, 362 U.S. 1, 4 L.Ed. 2d 494, 80 S. Ct. 527 (1960), this Court considered several federal and constitutional questions, all but one of which were raised in the State courts below. The Court made the following determination on the basis that the Petitioners failed to raise the issue in the lower courts and in doing so stated as follows:

We do not pass upon petitioner's contention as to the privileges and immunities clause of the 14th Amendment, since it was neither raised in nor considered by the California courts. 362 U.S. 9, 4 L. Ed. 2d 500.

Similarly, in *Beck v. Washington*, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955 (1962), the petitioner contended that the Washington State statute permitting persons in custody to challenge grand jurors denied equal protection to persons who were not in custody and investigated by grand juries. The Court refused to consider this question on the basis that it had not been raised and considered in the Washington State courts below:

This point is not properly before this court. Although both opinions of the Washington Supreme Court discussed the interpretation of Section 10.23.030, neither considered that question in light of the Equal Protection argument for that argu-

ment was never properly presented to the court in relation to this Statute. 369 U.S. 549, 550, 8 L. Ed.2d 107.

The Petitioners' contention in the instant case, that they have been denied due process of law under the Fourteenth Amendment, by a refusal of the Utah courts to grant jurisdiction over the Respondent in Utah, was never raised or considered at the Utah Supreme Court. There is nothing contained in the Petitioners' brief on appeal, or in the brief on petition for rehearing to the Utah Supreme Court that alleges that the Petitioners are or will be denied due process of law if jurisdiction is not granted over the Respondents. Neither is the federal question of a denial of due process to the Petitioners mentioned anywhere in the official opinion of the Utah Supreme Court reported in 549 P.2d 439 (1976). In *Street v. New York*, 394 U.S. 576, 22 L. Ed.2d 572, 89 S. Ct. 1354 (1969), the Supreme Court held that a failure of the State court to pass upon the federal question presented the assumption that it was not raised or presented in the State courts:

If the question was not so presented, then we have no power to consider it. [Citations omitted.] Moreover, this court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary. See *E.G., Bailee v. Anderson*, *Supra*; *Chicago, I.&L.R. Co. v. McGuire*, 196 U.S. 128, 131-133, 49 L. Ed. 413, 415, 417, 25 S. Ct. 200 (1905). 394 U.S. 582, 22 L. Ed.2d 579.

Since there is nothing in the Utah Supreme Court opinion, or elsewhere in the record indicating that the Petitioners presented the issue that they were being denied

due process of law under the Fourteenth Amendment, this Court cannot consider this federal issue and, therefore, the Writ of Certiorari should be denied.

POINT II

THE UTAH SUPREME COURT'S INTERPRETATION AND APPLICATION OF THE UTAH "LONG-ARM STATUTE," 78-27-22 through 78-27-24 U.C.A. 1953 as amended, DID NOT DEPRIVE PETITIONERS OF DUE PROCESS OF THE LAW.

Petitioners state that the Supreme Court of Utah denied them due process of law when it affirmed the decision of the lower court, quashing the service of the summons on AMI and dismissing Petitioners' complaints. As authority for the basis of this due process allegation, the Petitioners cite language from the Utah "Long-Arm Statute," 78-27-22 U.C.A., 1953, as amended, which provides that jurisdiction should be asserted as broadly as possible over non-resident defendants but not so broadly as to violate the due process clause of the Fourteenth Amendment.

A careful reading of this statutory language and reference to the United States Supreme Court opinions indicate that the purpose of the "Long-Arm Statutes" in Utah and elsewhere is to provide for personal jurisdiction over defendants to the extent that the defendants are not deprived of due process of law by such a jurisdictional reach. The Petitioners have misconstrued the statutory language as somehow providing that a denial of jurisdiction over the defendants by the court can be a deprivation of due process to the plaintiff, who has chosen the forum in which to sue. Petitioners, however, fail to present to the Court how the interpretation and application of the Utah "Long-Arm Statute" denying jurisdiction over the Respondent

in any way denied due process of law to the Petitioners. Conversely, if the Utah courts had granted jurisdiction over the Respondent in the instant case, it may well have been a denial of due process to the Respondent as it would have presented an unreasonable burden upon the Respondent to defend the action in Utah. This protection extended to *defendants* has often been recognized as a proper safeguard. In *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945), this Court recognized the need to insure the due process protection to be accorded a defendant and applied the "minimum contacts" doctrine. In so doing, the Court stated:

Conversely, it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in its state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. [Citations omitted.] To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process. 326 U.S. 317, 90 L. Ed. 102, 103.

The Respondent submits that the State of Utah could repeal its "Long-Arm Statute" altogether without affecting the rights of the citizens under the Fourteenth Amendment of the United States Constitution. The mere reference to the United States Constitution in a State statute does not create federal constitutional issues in the interpretation and application of that statute by a State Supreme Court.

The Utah Supreme Court itself has stated in a case cited by the Petitioners in all the proceedings below that

the due process protections afforded in the purpose of the Utah "Long-Arm Statute" are for the protection of the defendants. In *Hill v. Zale Corporation*, 25 Utah 2d 357, 482 P.2d 332 (1971), the court stated:

It is appreciated that the language just quoted is necessarily broad sounding generality; and that it must be so interpreted and applied as to conform with basic concepts of fairness and due process of law. This mandates that a foreign corporation should not be subjected to undue difficulties from lawsuits merely because its products are distributed in this state or may be purchased and sold by others therein. 25 Utah 2d 359.

Having failed to present any arguments as to how the Petitioners have been denied due process of law under the Fourteenth Amendment, the Petitioners then cite *State v. Phillips*, 540 P.2d 936 (Utah, 1975), as authority for the contention that the Utah Supreme Court does not recognize or apply the Fourteenth Amendment to the United States Constitution, and by referring to this case the Petitioners somehow imply that they have been denied the protections of the Fourteenth Amendment by the Utah Supreme Court in the instant case. It goes without saying, however, that the Petitioners' reference to *State v. Phillips*, *Supra*, is misplaced and irrelevant to the instant case. Petitioners have not demonstrated how the Utah Supreme Court in the instant case has in any way ignored or abridged the Fourteenth Amendment or denied the Petitioners due process of law by denying personal jurisdiction over the Respondents. On the contrary, the Utah court seems to recognize and apply the Fourteenth Amendment protections of due process by refusing to grant jurisdiction over the Respondents because of the lack of sufficient minimum contacts to present a valid basis for jurisdiction.

The Petitioners are not alleging that the Utah "Long-Arm Statute" is in any way repugnant to the Constitution

or the federal laws, but are merely contending that the Supreme Court of Utah misinterpreted or misapplied the Utah Statute to the facts of the instant case. Such a contention does not demonstrate a denial of due process to the Petitioners. In *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 61 L. Ed. 644, 37 S. Ct. 318 (1917), the Court made a general statement as to why a similar claim was not a valid basis for alleging a deprivation of due process of law:

The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the State, and thereby infringed the due process and equal protection clause of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the State courts upon questions of state law. *Sayward v. Denny*, 158 U.S. 180, 186, 39 L. Ed. 941, 943, 15 S. Ct. 777; *Central Land Co. v. Laidley*, 159 U.S. 103, 112, 40 L. Ed. 91, 94, 17 S. Ct. 80; *Castillo v. McConnico*, 168 U.S. 674, 683, 684, 42 L. Ed. 622, 625, 626, 18 S. Ct. 229. The question presented, other than those relating to the validity of the State Boards adjudication, all turned exclusively upon the law of the state, and the state court's decisions of them is controlling. 243 U.S. 165, 166, 61 L. Ed. 649.

CONCLUSION

The Petitioners' claim of a denial of due process of law under the Fourteenth Amendment was never presented or considered in the Utah Courts below, and consequently, cannot and should not be considered by the United States Supreme Court. Since the only federal question addressed in the petition for a Writ of Certiorari is the denial of due process to the Petitioners, the Writ should be denied on

the basis that the federal question was never presented in the lower court proceedings below.

Furthermore, the Petitioners have misconstrued and misapplied the statutory language of the Utah "Long-Arm Statute," Utah Code 78-27-22, referring to providing jurisdiction over the defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment, as somehow providing due process protections to the plaintiff, or the Petitioners in the instant action. It is uncontradicted that the statutory language referring to the due process clause of the Fourteenth Amendment is designed to insure protections for the defendant and not for the plaintiffs who initiate the actions and bring suit in the forum of their choice. Due process protections in the "minimum contacts" doctrine and the Utah "Long-Arm Statute" insure that jurisdiction cannot be granted over defendants when the contacts of the defendant are not sufficient enough to require the defendant to come in and defend in the plaintiff's choice of forum. The Petitioners have not demonstrated how the Utah court's interpretation and application of the Utah "Long-Arm Statute" presents a due process claim for the Petitioners. Such a State court's interpretation and application of its own State laws, as in the instant case, have been recognized by the United States Supreme Court as not presenting a due process question.

For the foregoing reasons, the Respondent respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

STRONG & HANNI

By *Philip R. Fishler*

PHILIP R. FISHLER

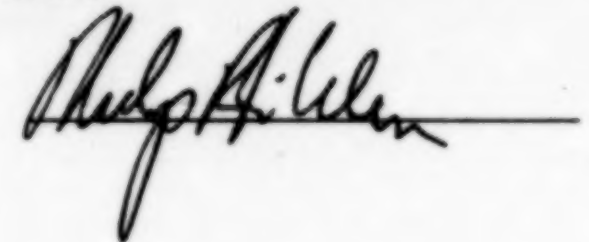
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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of Respondent's Brief in Opposition were mailed to William H. Henderson and Joseph C. Fratto, Attorneys for Petitioners, at their offices at 104 John Hancock Building, 455 South Third East, Salt Lake City, Utah 84111, in a postage prepaid properly addressed envelope on the 9th day of November, 1976, and that the above are all of the parties required to be served.

A handwritten signature in black ink, appearing to read "Philip A. Allen", is written over a horizontal line.